

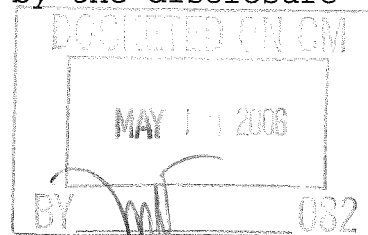
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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,) Case No. SA CR 05-36-JVS
)
Plaintiff,) <u>EX PARTE APPLICATION FOR AN</u>
) <u>ORDER PERMITTING RELEASE OF</u>
v.) <u>GRAND JURY TRANSCRIPT;</u>
) <u>MEMORANDUM OF POINTS AND</u>
KENNETH KETNER,) <u>AUTHORITIES; DECLARATION OF</u>
) <u>BRENT G. TABACCHI</u>
Defendant.)
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Plaintiff United States of America, by and through its attorney of record, the United States Attorney's Office for the Central District of California, applies ex parte for an order pursuant to Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure, authorizing the government to provide counsel of record for the defendant in this case a copy of the grand jury testimony of a witness whom the government intends to call at trial. This application is necessitated by the disclosure



1 provisions of the Jencks Act, Title 18, United States Code
2 § 3500, and is based on the accompanying memorandum of points and
3 authorities and declaration of Brent G. Tabacchi, on the files
4 and records of this case, and on such further evidence and
5 argument as may be presented at any hearing on this application.

6 DATED: May 1, 2006

Respectfully submitted,

7 DEBRA WONG YANG
8 United States Attorney

9 WAYNE R. GROSS
10 Assistant United States Attorney
11 Chief, Santa Ana Branch

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BRENT G. TABACCHI
13 Assistant United States Attorney

14 Attorneys for Plaintiff
15 United States of America
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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Criminal Procedure 6(e) ("Rule 6(e)"), the government seeks an order from this Court permitting disclosure of certain grand jury testimony to defendant's counsel prior to the trial in this case. As a general proposition, Rule 6(e) prohibits "an attorney for the government" from "disclos[ing] a matter occurring before the grand jury." Rule 6(e)(2)(B)(vi). Upon the government's motion, however, "the court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand jury matter . . . preliminarily to or in connection with a judicial proceeding." Rule 6(e)(3)(E)(i). The district court's power to order disclosure is discretionary and may be exercised when "compelling necessity" outweighs the countervailing policy of grand jury secrecy. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 470 (E.D. Pa. 1971). However, when the policy reasons underlying secrecy¹ "do not apply [to] a given situation, or apply to only an insignificant degree, the party seeking

¹ The Ninth Circuit has recognized five policy considerations underlying the need for grand jury secrecy: "(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation." U.S. Ind., Inc. v. United States Dist. Ct., 345 F.2d 18, 21 (9th Cir. 1965).

1 disclosure should not be required to demonstrate a large
2 compelling need" for the grand jury testimony. U.S. Industries,
3 Inc. v. United States District Court, 345 F.2d 18, 21 (9th Cir.
4 1965).

5 In this case, the policy considerations that warrant grand
6 jury secrecy do not counsel against disclosure of the
7 transcripts. Most notably, defendant already has been indicted
8 in this case.

9 In contrast, compelling reasons justify an order permitting
10 disclosure of the grand jury testimony. In particular, the
11 Jencks Act, 18 U.S.C. § 3500, requires the government to "produce
12 any 'statement' in its possession of a witness it has called
13 which relates to the subject matter of which the witness has
14 testified . . . includ[ing] a transcript of a witness's testimony
15 before a grand jury." United States v. Knowles, 594 F.2d 753,
16 755 (9th Cir. 1979). Here, during its case-in-chief in these
17 proceedings, the government may call as a witness an individual
18 who testified before the grand jury that indicted this matter.
19 Thus, to permit the government to comply with its obligations
20 under the Jencks Act and to promote the interests of justice by
21 allowing defense counsel an opportunity to review the requested
22 materials prior to trial, the court should permit the government
23 to disclose the grand jury testimony in this case to defense
24 counsel. See United States v. Kerr, 981 F.2d 1050, 1052 (9th
25 Cir. 1992) (concluding that government complied with Jenck's
26 obligations by turning over to defendant grand jury statements of
27 government witnesses).

28 However, the government requests that defense counsel and

1 defendant be ordered (a) not to disclose the grand jury testimony
2 except as necessary in preparation of the defense, and (b) to
3 supply a copy of the court's order permitting disclosure (and
4 restricting use of the disclosed grand jury testimony) to anyone
5 to whom they disclose the grand jury testimony.

6 DATED: May 1, 2006

Respectfully submitted,

7 DEBRA WONG YANG
United States Attorney

8 WAYNE R. GROSS
9 Assistant United States Attorney
Chief, Santa Ana Branch

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11 BRENT G. TABACCHI
12 Assistant United States Attorney

13 Attorneys for Plaintiff
14 United States of America
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DECLARATION OF BRENT G. TABACCHI

I, Brent G. Tabacchi, hereby declare as follows:

1. I am an Assistant United States Attorney for the Central District of California. In that capacity, I represent the government in United States v. Ketner, No. CR 05-36-JVS.

2. This Court has scheduled trial in this case for May 30, 2006.

3. I anticipate that the government may call during trial one witness who testified before the grand jury during its investigation of this case. Such testimony constitutes a "statement" within the ambit of the Jencks Act, 18 United States Code, § 3500, which the government is required to provide to the defense.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2006, in Santa Ana, California.


BRENT G. TABACCHI

CERTIFICATE OF SERVICE BY MAIL

I, **REBECCA SATO**, declare: That I am a citizen of the United States and resident or employed in Orange County, California; that my business address is United States Attorney's Office, 411 West Fourth Street, Suite 8000, Santa Ana, California 92701; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, at whose discretion the service by mail described in this Certificate was made; that on May 1, 2006, I deposited in the United States Mails, United States Attorney's Office, 411 West Fourth Street, Suite 8000, Santa Ana, California 92701 in the above-entitled action, in an envelope bearing the requisite postage, a copy of:

EX PATE APPLICATION FOR AN ORDER PERMITTING RELEASE OF GRAND JURY TRANSCRIPT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF BRENT G. TABACCHI

addressed to:

SEE ATTACHMENT

at their last known address, at which place there is a delivery service by United States Mail.

This Certificate is executed on May 1, 2006, Santa Ana, California. I declare under penalty or perjury that the foregoing is true and correct.



REBECCA SATO

Service List

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